

# American Indian Law Review

---

Volume 45 | Number 1

---

2021

## The Secretary of the Interior Has the Authority to Take Land into Trust for Federally Recognized Alaska Tribes

Meghan O'Connor

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#)

---

### Recommended Citation

Meghan O'Connor, *The Secretary of the Interior Has the Authority to Take Land into Trust for Federally Recognized Alaska Tribes*, 45 AM. INDIAN L. REV. 89 (2021),  
<https://digitalcommons.law.ou.edu/ailr/vol45/iss1/3>

This Comment is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact [darinfox@ou.edu](mailto:darinfox@ou.edu).

# THE SECRETARY OF THE INTERIOR HAS THE AUTHORITY TO TAKE LAND INTO TRUST FOR FEDERALLY RECOGNIZED ALASKA TRIBES

*Meghan O'Connor\**

## *I. Introduction*

Acreage proves Alaska is the largest state in the United States by far, but for Alaska Natives this land, specifically trust land, has posed an issue for decades. For almost forty years, the Department of the Interior (DOI) has debated over whether the Secretary of the Interior can take land into trust in Alaska.<sup>1</sup> Trust land is an important tool to help Native American tribes regain their ancestral lands. Without this tool, Alaska Natives were at a great disadvantage for many years when it came to reclaiming their original lands compared to Native American tribes in other states. It was not until 2017 that land could be taken into trust for Alaska Natives as it is for Native American tribes in the lower contiguous states. In January of 2017, the DOI issued Solicitor Opinion M-37043 (the authority opinion), which stated that the Secretary of the Interior did have the authority to take land into trust for Alaska Natives under the Alaska Indian Reorganization Act (Alaska IRA).<sup>2</sup> The Solicitor concluded that the Alaska IRA extended the Secretary of the Interior's authority to Alaska in section 5 of the Indian Reorganization Act (original IRA).<sup>3</sup>

However, in June of 2018, President Trump's administration withdrew the authority opinion, pending review, because it "omits discussion of important statutory developments, resulting in an incomplete analysis of the Secretary's authority to acquire land in trust in Alaska."<sup>4</sup> Currently, the authority opinion is still pending review<sup>5</sup> and the DOI has been holding consultations regarding the land-into-trust issue with Alaska Native

---

\* Third-year student, University of Oklahoma College of Law.

1. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

2. *Id.* at 22.

3. *Id.*

4. Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review, Op. Sol. Interior No. M-37053, at 2 (June 29, 2018), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf>.

5. *Id.*

Corporations and Alaska federally recognized tribes, the last of which occurred on March 7, 2019.<sup>6</sup>

Part I of this Comment has served to introduce the land-into-trust debate brewing in Alaska. Part II discusses the history of Alaska and its effects on the Alaska Natives. Part III highlights the history of land claims made by Alaska Natives, while Part IV explains the benefits trust land would provide to Alaska Natives. Part V introduces some notable cases on Alaska's land-into-trust issue. Parts VI, VII, VIII, IX, and X discuss the two solicitor opinions in detail. Then Part XI explores the idea that the Secretary has the authority under section 5 of the original IRA to take land into trust for federally recognized Alaska tribes. Parts XII and XIII look at the future of the land-into-trust issue in Alaska. And Part XIV concludes that a new solicitor opinion should be issued confirming the Secretary's land-into-trust authority in Alaska, which would help Alaska Natives reclaim more of their lost ancestral lands.

## *II. A Brief History of Alaska's Road to Statehood and Its Effect on Alaska's Native People*

In modern history, the first outsiders to travel to Alaska were Russian fur traders in the eighteenth century.<sup>7</sup> Despite the fact that indigenous people had been living in Alaska for tens of thousands of years, the Russians stole the claim to the land.<sup>8</sup> Then, in 1867, Russia sold Alaska to the United States for \$7.2 million.<sup>9</sup>

A few years later, in 1872, gold was discovered near Sitka, Alaska.<sup>10</sup> This discovery spiked interest in the Alaskan territory, and many people migrated to Alaska in search of their fortunes; in 1888, over 60,000 people arrived in Alaska.<sup>11</sup> Between 1897 and 1900, the Klondike Gold Rush occurred, which brought over 100,000 prospectors to the state.<sup>12</sup> Unfortunately, as more and more of these outsiders came to Alaska, they

---

6. *Alaska IRA*, U.S. DEP'T OF THE INTERIOR INDIAN AFFS., <https://www.bia.gov/as-ia/raca/regulations-development-andor-under-review/alaska-ira> (last visited Sept. 29, 2019).

7. AJ+, *This Is the Story of Alaska Natives' Fight for Their Land [Our Fight to Survive, Pt. 1]*, YOUTUBE (Nov. 19, 2017), [https://youtu.be/50\\_kse-Uh-g](https://youtu.be/50_kse-Uh-g) [hereinafter *Story of Alaska Natives' Fight*].

8. *Id.*

9. *Id.*

10. *Alaska's History*, ALASKA PUB. LANDS INFO. CTRS., <https://www.alaskacenters.gov/explore/culture/history> (last visited Nov. 2, 2019).

11. *Id.*

12. *Id.*

transmitted diseases to Native populations which lacked the proper immunities.<sup>13</sup> According to Evon Peter, Vice Chancellor of the University of Alaska, Fairbanks, “From the time of contact up until about the early 1920s, it’s said that we lost two-thirds of our [native] population.”<sup>14</sup>

By the 1930s, Alaska Native children were sent to schools, including boarding schools, based on western education.<sup>15</sup> When Alaska Native children entered these schools, their traditional clothing was discarded, the boys’ hair was cut short, and they were not allowed to speak their native languages.<sup>16</sup> Upon returning to their villages and families, these Alaska Native children no longer fit in with their own people. For example, these children no longer spoke the same language as their parents and were unable to hunt and survive on the land as their parents did.<sup>17</sup>

Although the discovery of gold changed Alaska’s history in many ways, World War II may have had an even more profound impact; certainly, the war had much to do with Alaska’s road to statehood. In 1935, when U.S. General Billy Mitchell spoke before the United States Congress, he stated: “I believe that in the future, whoever holds Alaska will hold the world. I think it is the most important strategic place in the world.”<sup>18</sup> General Mitchell’s prediction quickly held true, when on June 3, 1942 the Aleutian Islands of Attu and Kiska were officially occupied by Japanese military forces.<sup>19</sup> During this Japanese occupation, it became obvious that whoever controlled Alaska’s Aleutian Islands controlled transportation routes in the Pacific.<sup>20</sup> In the end, it took almost an entire year for the United States and Canada to reclaim these Aleutian Islands from the Japanese.<sup>21</sup>

Overall, World War II caused thousands of soldiers to be stationed in Alaska.<sup>22</sup> This new influx of outsiders led to many changes for the Alaska Native people; for the first time in Alaska’s history, Alaska Natives became a minority on their own land.<sup>23</sup> In 1958, a little over a decade after the end of the war, Alaska held a vote to either become a state or remain a

---

13. *Story of Alaska Natives’ Fight*, *supra* note 7.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *World War II in Alaska*, ALASKA PUB. LANDS INFO. CTRS., <https://www.alaskacenters.gov/explore/culture/history/world-war-ii> (last visited Nov. 3, 2019).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Story of Alaska Natives’ Fight*, *supra* note 7.

23. *Id.*

territory.<sup>24</sup> The vote for statehood passed easily because Alaska Natives lacked any real voting power at the time.<sup>25</sup> However, Alaska's newfound status as a state did not clear up the issue regarding who actually owned the land.<sup>26</sup>

### *III. The History of Land Claims by Alaska Natives*

As noted above, the United States began its relationship with Alaska Natives in 1867.<sup>27</sup> Under the 1867 Treaty of Cession, Russia ceded to the United States its territorial possessions in North America.<sup>28</sup> The treaty also provided that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."<sup>29</sup>

After the United States purchased Alaska, Congress passed statutes recognizing the rights of Alaska Natives to their lands.<sup>30</sup> For instance, Congress passed the Organic Act in 1884, which declared "[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them."<sup>31</sup> Then, in 1900, Congress passed a second Organic Act, which made it clear that "Alaska Natives were not to be disturbed in their use and occupancy of land in Alaska."<sup>32</sup>

Prior to the original IRA, there were about nineteen large reservations of different origins in Alaska established by either Congress or executive order.<sup>33</sup> In 1934, Congress enacted the original IRA; section 5 of the Act provided the Secretary of the Interior the authority to acquire land in trust for Indians.<sup>34</sup> Section 19 of the original IRA, which defines who is eligible for the Act's benefits, states that "Eskimos and other aboriginal peoples of

---

24. *Id.*

25. *Id.*

26. *Id.*

27. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043, at 1 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

28. *Id.*

29. *Id.* at 1–2 (quoting Treaty of Cession, Russ.-U.S., art. III, Mar. 30, 1867, 15 Stat. 539, 542).

30. *Id.* at 2–4.

31. *Id.* at 2 (quoting Act of May 17, 1884, § 8, 23 Stat. 24, 26).

32. *Id.* (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 407(3)(b)(i), at 328 (Nell Jessup Newton et al. eds., 2012)) (misattributed by the source to Act of June 6, 1900, 31 Stat. 321).

33. *Id.*

34. *Id.* at 2–3.

Alaska shall be considered Indians.”<sup>35</sup> Yet, when the Act was enacted, section 13 provided that the original IRA was not applicable to any of the “[t]erritories, colonies, or insular possessions of the United States,” and made clear that only certain provisions of the Act, but not section 5, would be applicable in Alaska.<sup>36</sup> However only two years later, in 1936, Congress amended the original IRA and extended more provisions to Alaska, including the Secretary of the Interior’s section 5 authority to take land into trust.<sup>37</sup> Such authority would provide a great tool to Alaska Natives wishing to reclaim lands that once belonged to their ancestors.

Alaska Natives started bringing aboriginal land claims in the 1950s and 1960s, which inevitably led to conflicts over land with the State of Alaska.<sup>38</sup> For example, some Alaska Native villages between Anchorage and Fairbanks began complaining that the State was taking their land.<sup>39</sup> Although the State of Alaska was obligated to protect the land where Alaska Natives lived, those boundaries had never been properly drawn.<sup>40</sup> As a result, the State began to take the land for itself.<sup>41</sup> Then, the discovery of oil in Alaska’s North Slope at Prudhoe Bay forced Alaska—and the world—to pay attention to the new state’s land ownership problem.<sup>42</sup>

The oil field at Prudhoe Bay was discovered by Humble Oil and Atlantic Richfield Company on March 12, 1968.<sup>43</sup> Located 650 miles north of Anchorage, “Prudhoe Bay covers 213,543 acres . . . [and] is ranked among the top 20 oil fields ever discovered worldwide . . . .”<sup>44</sup> Similar to the discovery of gold in the Alaskan territory, almost a century prior, this new discovery soon changed Alaska’s history once again. While the State of Alaska was in dire need of the revenue oil could produce, the oil industry simply wanted the land ownership issue resolved.<sup>45</sup> And although the oil industry did not care who owned the land, it wanted to ensure it had access

---

35. *Id.* at 3 (quoting 25 U.S.C. § 5129).

36. *Id.* (quoting 25 U.S.C. § 5118).

37. *Id.* at 4.

38. *Id.* at 6.

39. *Story of Alaska Natives’ Fight*, *supra* note 7.

40. *Id.*

41. *Id.*

42. *Id.*

43. Ariana Hurtado, *Prudhoe Bay: A ‘Once-In-A-Lifetime Discovery,’* HART ENERGY (Feb. 2, 2015, 09:00 AM), <https://www.hartenergy.com/exclusives/prudhoe-bay-once-lifetime-discovery-175011>.

44. *Id.*

45. *Story of Alaska Natives’ Fight*, *supra* note 7.

to both the oil and the land necessary to build the Trans Alaska Pipeline.<sup>46</sup> But in order to build the Trans Alaska Pipeline, the State of Alaska needed to know who owned title to the land the pipeline would cross.<sup>47</sup>

To solve this land ownership issue, Congress enacted the Alaska Native Claims Settlement Act in 1971, which was intended to settle all land claims brought by Alaska Natives.<sup>48</sup> The Alaska Native Claims Settlement Act terminated aboriginal land claims as well as certain use and occupancy rights in Alaska.<sup>49</sup> In fact, it revoked “the various reserves set aside . . . for Native use” groups<sup>50</sup> in accordance with legislation or through Executive or Secretarial Order.<sup>51</sup> At the same time, Congress authorized the transfer of \$962 million of state and federal funds and nearly forty-four million acres of Alaskan land to Alaska Natives.<sup>52</sup> At the time, this was the largest native land settlement in United States history.<sup>53</sup>

However, the Alaska Native Claims Settlement Act did not directly transfer the land to Alaska Natives.<sup>54</sup> Rather, the Act created Alaska Native Corporations which would own the forty-four million acres.<sup>55</sup> Alaska Natives became shareholders in those corporations, and suddenly hunters, fishermen, and housewives had to successfully manage them.<sup>56</sup> These Alaska Native Corporations include Aleut, Koniag, Bristol Bay, Calista, Cook Inlet, Chugach, AHTNA, Sealaska, Doyon, Bering Straits, NANA, and Arctic Slope.<sup>57</sup>

Many of the Native corporations saw large profits because of oil and mining.<sup>58</sup> To capitalize on those profits, the Native corporations worked with companies such as ExxonMobil, British Petroleum, and ConocoPhillips.<sup>59</sup> However, these are the same companies and industries

---

46. *Id.*

47. *Id.*

48. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043, at 6 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

49. *Id.* at 7.

50. *Id.* (noting an exception for the Annette Island Reserve for the Metlakatla Indian Community).

51. *Id.* (quoting 43 U.S.C. § 1618(a)).

52. *Id.*

53. *Story of Alaska Natives' Fight*, *supra* note 7.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

that have contributed to climate change, which threatens the traditional hunting and fishing grounds of Alaska Natives.<sup>60</sup> Further, the Alaska Native Claims Settlement Act made Alaska Natives subject to hunting licenses, restricted areas, and designated seasons.<sup>61</sup>

Additionally, though it made great changes to Native land ownership in Alaska, the Alaska Native Claims Settlement Act did not change the Secretary of the Interior's authority to place land into trust in Alaska under section 5 of the original IRA—a power extended by the 1936 Amendments to the Act.<sup>62</sup>

In 1976, Congress passed the Federal Land Policy and Management Act.<sup>63</sup> This Act revoked the Secretary of the Interior's authority to establish reservations in Alaska under section 2 of the 1936 Amendments to the original IRA.<sup>64</sup> It also repealed the Secretary of the Interior's authority to patent lots within Alaska Native townsites.<sup>65</sup> However, the Federal Land Policy and Management Act did not mention any changes to the original IRA section 5's application to Alaska.<sup>66</sup>

Unfortunately, the DOI continued to debate about whether the Secretary's section 5 authority applied to Alaska following the enactment of the Alaska Native Claims Settlement Act and the Federal Land Policy and Management Act. In 1978, the Associate Solicitor of Indian Affairs concluded that, through the Alaska Native Claims Settlement Act, "Congress intended permanently to remove from trust status all Native land in Alaska except allotments and the Annette Island Reserve[.]"<sup>67</sup> In 1980, the DOI implemented regulations regarding the acquisition of land into trust for the first time, and these regulations included a provision which read: "These regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or it[s] members."<sup>68</sup>

---

60. *Id.*

61. *Id.*

62. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043, at 8 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (quoting Memorandum from Thomas W. Fredericks, Assoc. Solic., Indian Affs., to Ass't Sec'y, Indian Affs., Trust Land for the Natives of Venetie and Arctic Village 3 (Sept. 15, 1978)).

68. *Id.* (quoting Land Acquisitions, 45 Fed. Reg. 62,034, 62,036 (Sept. 18, 1980)).



The debate continued into the twenty-first century; in 2001, the Solicitor concluded that Congress's failure to repeal section 5 of the original IRA as extended to Alaska in the 1936 Amendments raised the question of whether the Secretary of the Interior still holds the authority to take land into trust in Alaska.<sup>69</sup> Around the same time, the DOI amended the land-into-trust regulations, which included a provision substantially similar to the Alaska exception in the original regulations.<sup>70</sup> Yet, later that year, the DOI revoked that amendment to the regulations, and the original exception that prohibited the acquisition of land into trust in Alaska remained in effect.<sup>71</sup>

Finally, in 2014, the DOI issued a final rule that eliminated the regulatory ban on trust land acquisitions in Alaska.<sup>72</sup> The DOI concluded that the Alaska Native Claims Settlement Act left the Secretary of the Interior's land-into-trust authority in place in Alaska, and further noted "there should not be different classes of federally recognized tribes."<sup>73</sup>

#### *IV. The Benefits that Trust Land Would Bring to Alaska Natives*

Today, Alaska has 229 federally recognized tribes—a significant number of which consist of small villages located in the interior or western part of Alaska.<sup>74</sup> And while land-into-trust benefits have been seen by many Native American tribes in the lower forty-eight contiguous states, the concept is still rather new in Alaska.<sup>75</sup> Further, although the debate as to whether the Secretary of the Interior had the authority to take land into trust for Alaska Natives seemed to be finally settled, it was reignited in 2018. For those far removed, this debate may seem insignificant. But, for Alaska Natives, it is a continuing concern.

Many Alaska Native tribes will benefit greatly from putting land into trust. For example, they will receive various helpful tax benefits. The land

---

69. *Id.* at 9.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* (quoting Land Acquisitions in the State of Alaska, 79 Fed. Reg. 76,888, 76,890 (Dec. 23, 2014)).

74. Richard Mauer, *Feds Say No More Alaska Native Land into Trust — An Attack on Indian Country?*, ALASKA NEWS SOURCE (July 16, 2018, 09:44 PM), <https://www.ktuu.com/content/news/Feds-say-no-more-Native-land-into-trust--an-attack-on-Indian-Country--488346661.html>.

75. *Id.*

taken into trust will be exempt from state and local taxation.<sup>76</sup> Also, the tribes will possess their own taxation authority.<sup>77</sup> This taxation authority will extend to the activity and property of non-members and non-Indians when on Alaska Native land.<sup>78</sup> Consequently, Alaska Natives will have the ability to impose taxes on parties doing business on their trust lands.<sup>79</sup> The tribes can then use the taxes collected from these parties to provide revenue for “education, health care, law enforcement, and other governmental services.”<sup>80</sup>

Since trust lands are free from state and local regulation, such as zoning and land-use laws, the regulatory authority of Alaska Native tribes in these particular areas will greatly increase on their own land.<sup>81</sup> For instance, the tribes will be able to impose their own land use and environmental regulations on any land they acquire in trust.<sup>82</sup> In an era of self-determination, this type of regulatory authority will not only give the tribes more freedom in governing themselves, but it can also open up opportunities for better tribal housing and economic development.

Gaming can also bring vast economic benefits to certain Alaska Native tribes. The Indian Gaming Regulatory Act allows tribes to administer gaming “on Indian lands.”<sup>83</sup> While trust land fits the definition of “Indian lands” under the statute, the Indian Gaming Regulatory Act prohibits gaming on lands acquired in trust after 1988.<sup>84</sup> Therefore, while not all Alaska Native tribes will be able to take advantage of the Indian Gaming Regulatory Act, newfound gaming rights may introduce promising economic opportunities for those Alaska Native tribes that do qualify under the statute.

Lastly, putting land into trust for Alaska Natives will help improve law enforcement in tribal communities in a way that can benefit all Alaskan citizens. Specifically, it could help address some of the many public safety

---

76. Geoffrey D. Strommer et al., *Placing Land into Trust in Alaska: Issues and Opportunities*, 3 AM. INDIAN L.J. 508, 517 (2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1046&context=ailj>.

77. *Id.*

78. *Id.* at 518.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 519 (quoting 25 U.S.C. § 2701(5)).

84. *Id.* (citing 25 U.S.C. § 2719(a)) (unless one of the exceptions listed in the Indian Gaming Regulatory Act can be met).

concerns that disproportionately affect remote, rural Alaskan villages.<sup>85</sup> To illustrate, trust lands “would provide the jurisdictional basis and additional authority for Alaska tribal governments to address public safety issues, including domestic abuse, sexual violence and other offenses that disproportionately affect Native Alaskan women and children.”<sup>86</sup>

#### *V. Notable Cases on Alaska’s Land-into-Trust Issue*

Before the DOI issued the authority opinion—the land-into-trust power granting opinion—three federal court cases brought Alaska’s land-into-trust issue to light. These three cases are *Akiachak Native Community v. Salazar*, *Akiachak Native Community v. Jewell*, and *Akiachak Native Community v. United States Department of Interior*—the last of which likely led to the issuance of the authority opinion.

##### *A. Akiachak Native Community v. Salazar*

In *Akiachak Native Community v. Salazar*, Alaska Native tribes challenged the Secretary of the Interior’s decision to leave in place the regulation preventing Alaska Natives from acquiring land in trust under the original IRA.<sup>87</sup> The Alaska Natives argued that the Secretary’s land-into-trust authority in Alaska should be understood to have survived the Alaska Native Claims Settlement Act.<sup>88</sup> On the other hand, the State of Alaska argued that the Alaska Native Claims Settlement Act “implicitly repealed the Secretary’s statutory authority to take Alaska land into trust outside of Metlakatla.”<sup>89</sup>

The Alaska Natives also argued that the Alaska exception to section 5 of the original IRA is “not in accordance with law” because it violated 25 U.S.C. § 476(g), the privileges and immunities of Indian tribes statute,<sup>90</sup> which provided that:

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or

---

85. *See id.* at 520–21.

86. *Id.* at 521 (quoting [Comment] 51 - *Organized Village of Kasaan: 25 CFR 151 - Land Acquisitions in Alaska*, REGULATIONS.GOV, [https://downloads.regulations.gov/BIA-2014-0002-0059/attachment\\_1.pdf](https://downloads.regulations.gov/BIA-2014-0002-0059/attachment_1.pdf)).

87. 935 F. Supp. 2d 195, 197 (D.D.C. 2013).

88. *Id.* at 203.

89. *Id.* at 204.

90. *Id.* at 210.

diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.<sup>91</sup>

However, the Secretary of the Interior made two arguments as to the Alaska exception's legality. First, the Secretary stated that 25 U.S.C. § 476(g), the privileges and immunities of Indian tribes statute, was enacted because Congress disapproved of the Secretary's interpretation of section 16 of the original IRA, and not because of anything to do with section 5 of the original IRA.<sup>92</sup> Second, the Secretary argued that 25 U.S.C. § 476(g) only prohibited discrimination between tribes that were "similarly situated," and that Alaska Natives were not "similarly situated" to any other Native American tribes because of the Alaska Native Claims Settlement Act.<sup>93</sup> The United States District Court for the District of Columbia rejected both of the Secretary's arguments.<sup>94</sup> The district court also concluded that the Alaska Native Claims Settlement Act "left intact the Secretary's authority to take land into trust throughout Alaska."<sup>95</sup>

*B. Akiachak Native Community v. Jewell*

*Akiachak Native Community v. Jewell*, is the follow-up case to *Akiachak Native Community v. Salazar*; here, Alaska Natives once again challenged the regulation that prevented them from taking land into trust.<sup>96</sup> After the district court concluded in *Salazar* that the Alaska exception was "arbitrary and capricious and violated the Indian Reorganization Act," it ordered the parties to submit supplemental briefs discussing whether the Alaska exception could be severed from the rest of the land-into-trust provision.<sup>97</sup> After considering those briefs, the district court concluded that the Alaska exception could be severed from the rest of regulation and, as a result, ordered it to be severed and vacated.<sup>98</sup> Around the same time, the Bureau of Indian Affairs proposed a rule formally removing the Alaska exception.<sup>99</sup>

---

91. 25 U.S.C. § 476(g).

92. *Salazar*, 935 F. Supp. 2d at 210.

93. *Id.*

94. *Id.*

95. *Id.* at 208.

96. *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 10 (D.D.C. 2014).

97. *Id.* at 10–11.

98. *Id.* at 11.

99. *Id.*

The State of Alaska responded by filing a motion for a stay and injunction pending appeal.<sup>100</sup>

The district court considered four factors in determining whether to grant the State of Alaska's motion for a stay and injunction pending appeal: (1) Alaska's likelihood of success on the merits of its appeal; (2) if Alaska will suffer irreparable injury; (3) if issuance of the stay would substantially harm any other parties to the proceeding; and (4) the public interest.<sup>101</sup> After considering these four factors, the district court decided to grant in part the State of Alaska's motion for an injunction and enjoined the Secretary of the Interior from taking any land into trust in Alaska, pending the outcome of the appeal.<sup>102</sup>

### C. Akiachak Native Community v. United States Department of Interior

In the third case, *Akiachak Native Community v. United States Department of Interior*, Alaska Native Tribes sued the DOI in order to challenge the regulation that prevented Alaska Natives from acquiring land in trust under the original IRA once again.<sup>103</sup> After the district court held the Alaska exception to the original IRA was contrary to law, the DOI revised its regulations and dismissed its appeal.<sup>104</sup> However, the State of Alaska disagreed with the district court and the DOI, and sought to prevent any efforts by the United States to take land into trust for Alaska Natives within the state's borders.<sup>105</sup>

Yet, the State of Alaska did not bring an independent claim for relief; instead, it interceded in the district court as a defendant.<sup>106</sup> Therefore, because the controversy between the Alaska Native Tribes and the DOI was moot, the State of Alaska's appeal was dismissed for lack of jurisdiction.<sup>107</sup>

In this case, as in the two previous cases, the Alaska Natives argued that the Alaska Native Claims Settlement Act did not prohibit the Secretary of the Interior from placing land into trust in Alaska.<sup>108</sup> Meanwhile, the State of Alaska argued the Alaska Native Claims Settlement Act *did* prohibit the Secretary from placing land into trust in Alaska.<sup>109</sup> The Circuit Court

---

100. *Id.*

101. *Id.* at 12.

102. *Id.* at 18–19.

103. 827 F.3d 100, 101–02 (D.C. Cir. 2016).

104. *Id.* at 102.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 105–06.

109. *Id.* at 106.

decided that, because the Alaska exception no longer existed, the case became “classically moot for lack of a live controversy.”<sup>110</sup> Therefore, the case was enviably dismissed for lack of jurisdiction.<sup>111</sup> Judge Brown’s dissent in *Akiachak Native Community v. United States Department of Interior*, however, criticized the court for dismissing the case as “moot on the view that the Secretary’s repeal of a regulation the district court had already vacated earns a do-over under a deferential standard of review.”<sup>112</sup>

Although *Akiachak Native Community v. United States Department of Interior* was dismissed for lack of jurisdiction and did not actually solve the issue regarding the Alaska exception to the original IRA once and for all, it is likely that this case prompted the eventual issuance of the authority opinion. The authority opinion intended to solve the issue by confirming the Secretary of the Interior’s authority to take land into trust for Alaska Natives. However, less than two years later, the Trump Administration issued Solicitor Opinion M-37053 (the withdrawal opinion), which revoked the Secretary’s land-into-trust authority in Alaska, pending further review of the issue.

#### VI. An Introduction to the Dueling Solicitor Opinions

In the authority opinion, the Solicitor reaffirmed that “Congress’s extension of the [original] IRA to Alaska in 1936 provides specific authority to take lands into trust on behalf of Alaska Natives.”<sup>113</sup> The Solicitor noted “the Secretary’s authority to acquire land in trust for Alaska Natives was not repealed or otherwise amended when . . . Congress enacted [the Alaska Native Claims Settlement Act] and [the Federal Land Policy and Management Act].”<sup>114</sup> Overall, the Solicitor concluded “the Secretary’s authority to acquire land into trust for Alaska Natives is found in the Alaska IRA, which specifically extends the Secretary’s authority in Section 5 of the [original] IRA to Alaska.”<sup>115</sup>

However, this resolution to the land-into-trust issue in Alaska was short-lived. The authority opinion was issued on January 13, 2017,<sup>116</sup> and by June 29, 2018, the DOI had already released a new solicitor opinion withdrawing

---

110. *Id.*

111. *Id.* at 114–15.

112. *Id.* at 115 (Brown, J., dissenting).

113. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043, at 9 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

114. *Id.* at 10.

115. *Id.* at 22.

116. *Id.* at 1.

the authority opinion.<sup>117</sup> The new withdrawal opinion revoked the Secretary of the Interior's authority to acquire land into trust in Alaska, pending review.<sup>118</sup>

The withdrawal opinion followed the White House Chief of Staff's announcement on January 20, 2017, of a regulatory review process for any new or pending regulation.<sup>119</sup> This announcement was in direct response to President Trump's request for a review of all of the actions the Obama Administration had recently taken.<sup>120</sup> The Principal Deputy Solicitor, while exercising the authority of the Solicitor under Secretary's Order 3345, Amendment No. 18, stated:

Since initiating the regulatory review process mandated by the President's Chief of Staff, I have determined that Sol. Op. M-37043 omits discussion of important statutory developments, resulting in an incomplete analysis of the Secretary's authority to acquire land in trust in Alaska. To facilitate both the regulatory review process announced by the President's Chief of Staff and the preparation of the Department's statement of interim policy, I therefore withdraw Sol. Op. M-37043, pending review.<sup>121</sup>

The Principal Deputy Solicitor gave three specific reasons for withdrawing the authority opinion. First, the Principal Deputy Solicitor highlighted the failure of the previous opinion to fully discuss the possible implications of post-Alaska Native Claims Settlement Act legislation on the Secretary of the Interior's authority to take land into trust throughout Alaska.<sup>122</sup> Second, the Principal Deputy Solicitor noted "[t]he failure to address the District Court's holding regarding the applicability of 25 U.S.C. § 476(g) [the privileges and immunities of Indian tribes statute,] to Alaska Native Tribes."<sup>123</sup> And third, the Principal Deputy Solicitor stated that the

---

117. Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review, Op. Sol. Interior No. M-37053 (June 29, 2018), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf>.

118. *Id.* at 1.

119. *Id.*

120. Suzanne Downing, *Interior Department Withdraws Opinion on Alaska Native 'Land into Trust,' MUST READ ALASKA* (July 3, 2018), <https://mustreadalaska.com/interior-dept-withdraws-opinion-on-alaska-native-land-into-trust/>.

121. Withdrawal of Opinion M-37043, Op. Sol. Interior No. M-37053, at 1–2.

122. *Id.* at 4.

123. *Id.*

DOI's reliance in promoting the revised regulations left the analysis in the authority opinion "incomplete and unbalanced."<sup>124</sup>

*VII. A Breakdown of Solicitor Opinion M-37043*

In the authority opinion, the Solicitor found that, while the Alaska Native Claims Settlement Act settled native land claims without establishing any new trust land in Alaska, Congress never disposed of the existing land-into-trust authority that was expressly granted by the Alaska IRA.<sup>125</sup> Congress also did not limit the Secretary's land-into-trust authority when it enacted the Federal Land Policy and Management Act.<sup>126</sup>

The language of the Alaska IRA provides on its face that the Secretary of the Interior can take land into trust for Alaska Natives.<sup>127</sup> The first section of the Alaska IRA reads as follows:

Sections 1, 5, 7, 8, 15, 17, and 19 of the [original IRA] shall hereafter apply to the Territory [State] of Alaska: Provided, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under Sections 16, 17, and 10 of the Act of June 18, 1934.<sup>128</sup>

This section of the Alaska IRA remains in place today.<sup>129</sup> According to these terms, the Alaska IRA extends to Alaska the Secretary of the Interior's land-into-trust authority under section 5 of the original IRA, which grants the Secretary the authority to acquire land on behalf of Indians.<sup>130</sup>

In *Carcieri v. Salazar*, the United States Supreme Court acknowledged that Congress, in other statutory provisions, chose to expand the Secretary's authority to certain Indian tribes not encompassed within the definitions of

---

124. *Id.*

125. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043, at 10 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

126. *Id.*

127. *Id.*

128. *Id.* at 10–11 (citing 25 U.S.C. § 5119).

129. *Id.* at 11.

130. *Id.*



“Indian” set forth in the original IRA.<sup>131</sup> The Supreme Court cited a number of statutes that applied sections 5 and 19 to certain tribes regardless of whether they were under federal jurisdiction in 1934, and expressly cited the Alaska IRA as one of those statutes.<sup>132</sup>

The entire purpose of the Alaska IRA was to cure the limited applicability of the original IRA to the State of Alaska.<sup>133</sup> Since Alaska Natives usually did not live on reservations or group themselves as bands or tribes, section 16 of the original IRA, which authorized tribal constitutional governments, made little difference in Alaska.<sup>134</sup> Also, because of a drafting error committed by Congress in 1934, the corporate organization provisions in section 17 were accidentally left out of the sections of the original IRA that originally applied to Alaska.<sup>135</sup> Due to this error, Alaska Natives were unable to incorporate, which meant they could not receive money from the credit loan fund established under the original IRA.<sup>136</sup> Thankfully, the Alaska IRA fixed these errors and allowed seven more provisions of the original IRA to become applicable in Alaska, including the land-into-trust provision found in section 5.<sup>137</sup>

Not only is the plain language of the Alaska IRA consistent with the idea that Congress intended for Alaska Natives to gain certain benefits described in the original IRA, but the Alaska IRA’s own legislative history also supports this idea.<sup>138</sup> In 1936, Secretary of the Interior Harold L. Ickes gave Congress three reasons why reservations should be established in Alaska.<sup>139</sup> The first reason was to identify Alaska Native tribes with the lands they occupied.<sup>140</sup> The second was to mark the geographic limits of each Alaska Native tribe’s jurisdiction.<sup>141</sup> And the third reason was to protect the Alaska Native tribes’ economic rights within their jurisdiction.<sup>142</sup> As evidence, both the House and Senate Reports cite a letter from Secretary Ickes which stated “Sections 1, 5, 7, and 8 of the Indian Reorganization Act, extended to

---

131. *Id.* (citing *Carcieri v. Salazar*, 555 U.S. 379, 392 (2009)).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 11–12.

139. *Id.* at 12.

140. *Id.*

141. *Id.*

142. *Id.*

Alaska by H.R. 9866, are necessary in the establishment and the administration of . . . reservations.”<sup>143</sup>

Under the Indian canons of construction, statutes are liberally construed in favor of Indians and any ambiguities are also resolved in favor of Indians.<sup>144</sup> Further, the Solicitor’s interpretation was confirmed by a report prepared by the DOI in 1947 entitled “*Ten Years of Tribal Government Under I.R.A.*,” which identifies the tribes that voted either to accept or reject the original IRA pursuant to elections under section 18 of the original IRA.<sup>145</sup> The report stated that no elections were held in Alaska as to whether to accept or reject the original IRA because Alaska Natives “were automatically brought under the law.”<sup>146</sup> Overall, the Indian canons of construction support the idea that Congress intended to treat Alaska differently because of the differences in land occupation and differences in the ways Alaska Natives organize themselves in comparison to the Indian tribes living in the contiguous states.<sup>147</sup>

Additionally, the language of the original IRA itself applies section 5’s land-into-trust authorization to Alaska Natives.<sup>148</sup> Section 5 of the original IRA states that the Secretary of the Interior is “authorized . . . to acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians.”<sup>149</sup> In section 19, the definitional section of the original IRA, it is noted that “[f]or the purposes of this Act, Eskimos and other aboriginal peoples of Alaska *shall* be considered Indians.”<sup>150</sup> Therefore, when Congress applied section 5 of the original IRA to the Alaska Territory in 1936, the term “Indians,” as used in that section, clearly referred to Alaska Natives.<sup>151</sup>

Accordingly, the language in section 19 of the original IRA places Alaska Natives in their own separate category of Indians.<sup>152</sup> If Congress intended for Alaska Natives to meet one of the other definitions of “Indian” mentioned in section 19, then specific reference to Alaska Natives would have been surplusage because Alaska Natives would already have met

---

143. *Id.* (citing H.R. REP. NO. 74-2244, at 4 (1936)).

144. *Id.* at 18.

145. *Id.*

146. *Id.* (quoting THEODORE H. HAAS, TEN YEARS OF TRIBAL GOVERNMENT UNDER IRA 3 (1947)).

147. *Id.* at 18.

148. *Id.* at 13.

149. *Id.* (quoting 25 U.S.C. § 5108).

150. 25 U.S.C. § 5129; *see also* Op. Sol. Interior No. M-37043, at 13 n.102.

151. Op. Sol. Interior No. M-37043, at 13.

152. *Id.*

another definition.<sup>153</sup> Additionally, the use of the phrase “Eskimos and other aboriginal peoples of Alaska” is broad enough to apply to all of the Native peoples of Alaska, which further demonstrates Congress’ intent that the original IRA apply widely in what was, at the time, the Alaskan Territory.<sup>154</sup> Had Congress wanted the original IRA to apply narrowly within Alaska, it likely would have used more limiting language.<sup>155</sup> For example, Congress could have specified that only “Eskimos and Aleuts shall be considered Indians” and limited which Alaska Natives could benefit from the original IRA.<sup>156</sup> Fortunately, this was not the case; the definition of Indians under section 19 of the original IRA encompasses all Alaska Natives.

If section 19’s definition of “Indians,” which includes Alaska Natives, could be considered ambiguous in some way, the purpose of the original IRA itself and its legislative history resolve that ambiguity.<sup>157</sup> Further, the legislative history of the original IRA reveals that Congress intended for “Alaska Natives to be treated uniquely under the [original] IRA.”<sup>158</sup>

The first version of House Bill 7902—the bill that eventually became the original IRA—did not address Alaska at all.<sup>159</sup> Yet, the House hearings included a debate on whether House Bill 7902 applied to the Indians in Alaska.<sup>160</sup> This discussion ended with the Native people of Alaska being included in the bill.<sup>161</sup> Thereafter, an early amendment to the House bill addressed Alaska Natives and was endorsed by the DOI.<sup>162</sup> This amended bill resembled portions of the original IRA that were ultimately enacted into United States law by Congress.<sup>163</sup> In subsequent hearings on this bill, the House further discussed the differences in land occupation in Alaska, and Territorial Delegate Joseph Dimond<sup>164</sup> of Alaska mentioned the benefits

---

153. *Id.* at 13–14.

154. *Id.* at 14.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 15.

160. *Id.*

161. *Id.*

162. *Id.* at 16.

163. *Id.*

164. Anthony Joseph Dimond was a Delegate to the United States House of Representatives from the Territory of Alaska. *Dimond, Anthony Joseph*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguideretro.congress.gov/Home/MemberDetails?>

reservations could provide to Alaska Natives.<sup>165</sup> Then, in a Senate hearing on May 17, 1934, the Alaska Native addition to section 19's definition of "Indian" was discussed; Commissioner Collier stated this addition would "extend the land acquisition and credit benefits to these Alaska Indians who are pure-blood Indians and very much in need, and they are neglected, and they are Indians pure and simple."<sup>166</sup>

The legislative history of the original IRA clearly shows that Congress was aware of the unique status of Alaska Natives and intended to include them within the scope of the original IRA.<sup>167</sup> When Congress included Alaska Natives separately in section 19 of the original IRA, it revealed its intent that Alaska Natives be able to use the five applicable provisions of the original IRA to accomplish economic development and self-governance.<sup>168</sup>

Overall, the language, purpose, and legislative history of the original IRA support the conclusion that Alaska Natives qualify as "Indians" under the definition section of the Act.<sup>169</sup> As such, the Secretary of the Interior's authority to take Alaska lands into trust for Alaska Natives under the original IRA does not depend on whether these Alaska Natives also meet one of the other definitions of "Indian" mentioned in section 19, including the first definition listed, which refers to recognized Indian tribes that were under federal jurisdiction in 1934.<sup>170</sup> This fact also means that the Secretary's land-into-trust authority regarding Alaska Natives was not impacted by the United States Supreme Court's decision in *Carcieri v. Salazar*, which only affected the meaning and scope of the first definition of "Indian" laid out in section 19 of the original IRA.<sup>171</sup> Clearly, Congress intended for Alaska Natives to qualify as Indians under the original IRA.<sup>172</sup> It is important to note that Congress has never revoked or limited this authority of the Secretary of the Interior to take land into trust for Alaska

---

memIndex=D000353 (last visited Jan. 4, 2020). He held that office from March 4, 1933 until January 3, 1945. *Id.*

165. Op. Sol. Interior No. M-37043, at 16.

166. *Id.* at 17 (quoting *To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearing on S. 2755 Before the S. Comm. on Indian Affs.*, 73rd Cong. 265 (1934)).

167. *Id.*

168. *Id.* at 18.

169. *Id.* at 20.

170. *Id.*

171. *Id.*

172. *Id.*

Natives under the original IRA.<sup>173</sup> Neither the Alaska Native Claims Settlement Act nor the Federal Land Policy and Management Act have affected the Secretary's authority on this subject.<sup>174</sup>

The Alaska Native Claims Settlement Act did away with the existing reservations in Alaska, with the exception of the Metlakatla Indian Community on the Annette Islands, and repealed the authority to create reservations or acquire land.<sup>175</sup> However, the Alaska Native Claims Settlement Act did not mention or alter section 5 of the original IRA in any way.<sup>176</sup> In fact, the Alaska Native Claims Settlement Act left the Secretary of the Interior's land-into-trust authority completely alone.<sup>177</sup> There is no reason why the Secretary's authority under section 5 of the original IRA, which was extended to Alaska by the Alaska IRA, cannot co-exist with the Alaska Native Claims Settlement Act. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."<sup>178</sup> The Secretary of the Interior's authority to establish trust lands in Alaska is compatible with the Alaska Native Claims Settlement Act's land system.<sup>179</sup>

To illustrate, even after the Alaska Native Claims Settlement Act was enacted, the Metlakatla Indian Community continued to retain a reserve on the Annette Islands and other trust lands remained scattered throughout Alaska.<sup>180</sup> More than one million acres of restricted fee land was granted under the Alaska Native Allotment Act of 1906 and the Alaska Township Act of 1926.<sup>181</sup> Those one million acres of restricted fee lands are subject to the same taxation and alienation restrictions as trust lands and have been treated by Congress and the DOI as the equivalent of trust land.<sup>182</sup> While the Alaska Native Claims Settlement Act repealed the Alaska Native Allotment Act of 1906, it preserved all claims of Native individuals with pending allotment applications and the restrictions on already existing allotments.<sup>183</sup> Therefore, the Secretary of the Interior's land-into-trust authority under section 5 of the original IRA is not irreconcilable with the

---

173. *Id.* at 21.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

Alaska Native Claims Settlement Act; the Claims Settlement Act did not terminate all trust and/or restricted land in Alaska, nor did it prevent new restricted fee patents from being issued.<sup>184</sup>

The Secretary's land-into-trust authority does not conflict with the primary goal of the Alaska Native Claims Settlement Act. The purpose of the Alaska Native Claims Settlement Act was to settle all Alaska Native land claims "with maximum participation by Natives" regarding decisions that affected "their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, [and] without creating a reservations system or lengthy wardship or trusteeship."<sup>185</sup> While the Act did revoke all existing reservations except for the Metlakatla Indian Community's reserve on the Annette Islands, it did not prohibit the creation of any trusteeship or new reservations in Alaska after the settlement.<sup>186</sup> A tribe's decision to have land acquired in trust is not about imposing a trusteeship; instead, it is a decision by the tribe that is then followed by a discretionary decision by the Secretary of the Interior to take the land into trust.<sup>187</sup> As such, the Secretary of the Interior's land-into-trust authority is compatible with the Alaska Native Claims Settlement Act's purpose of supporting tribal self-governance in Alaska and maximizing property and other rights for Alaska Natives.<sup>188</sup> Consequently, the Alaska Native Claims Settlement Act and the Secretary of the Interior's authority under section 5 of the original IRA can co-exist in Alaska.<sup>189</sup>

If Congress had already revoked the Secretary of the Interior's authority to take land into trust for Alaska Natives, it would not have then expressly revoked the Secretary's authority to establish reservations in Alaska five years later under the Federal Land Policy and Management Act.<sup>190</sup> The Federal Land Policy and Management Act revoked section 2 of the Alaska IRA but left intact section 5, which contains the Secretary of the Interior's land-into-trust authority.<sup>191</sup> If Congress intended to revoke the Secretary's land-into-trust authority, the Federal Land Policy and Management Act would have revoked not only the section 2 reservation authority of the

---

184. *Id.*

185. *Id.* (quoting 43 U.S.C. § 1601(b)).

186. *Id.*

187. *Id.* at 21–22.

188. *Id.* at 22.

189. *Id.*

190. *Id.*

191. *Id.*

Alaska IRA but the section 5 land-into-trust authority as well.<sup>192</sup> Because the Federal Land Policy and Management Act did not expressly repeal section 5 of the Alaska IRA, it is unlikely that Congress intended for this section to be repealed.<sup>193</sup> Accordingly, the Alaska Native Claims Settlement Act and the Federal Land Policy and Management Act did not revoke section 5 of the original IRA as it applies to Alaska through the Alaska IRA; therefore, the Secretary of the Interior's authority to acquire land into trust in Alaska for the benefit of Alaska Natives remains intact.<sup>194</sup>

For about a year and a half, the authority opinion settled the land-into-trust issue in Alaska. Unfortunately, it did not provide a permanent resolution. In June of 2018, the withdrawal opinion pushed the conclusions reached in the authority opinion aside.<sup>195</sup> However, the withdrawal opinion did not explicitly offer its own conclusion on Alaska's land-into-trust issue. Instead, it withdrew the authority opinion and left the issue open for review. While the withdrawal opinion made clear that the authority opinion's conclusion on Alaska's land-into-trust issue was pending review, it still offered some analysis on the current administration's position on the issue.

#### *VIII. A Breakdown of Solicitor Opinion M-37053*

In the withdrawal opinion, the Principal Deputy Solicitor concluded that the analysis of the Secretary of the Interior's authority to take land into trust for Alaska Natives was incomplete in the authority opinion.<sup>196</sup> As a result, the Principal Deputy Solicitor withdrew the authority opinion, while claiming it did not discuss some important statutory developments.<sup>197</sup>

The Principal Deputy Solicitor started his historical support for the withdrawal of the authority opinion with information dating back to 1978. In that year, the Associate Solicitor for Indian Affairs stated that acquiring land in trust in Alaska would "be an abuse of the Secretary's discretion" based on the language and intent of the Alaska Native Claims Settlement Act.<sup>198</sup> The language in the Alaska Native Claims Settlement Act that the Associate Solicitor believed contradicted the Secretary's land-into-trust

---

192. *Id.*

193. *Id.*

194. *Id.*

195. Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review, Op. Sol. Interior No. M-37053, at 1 (June 29, 2018), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf>.

196. *Id.* at 1–2.

197. *Id.* at 2.

198. *Id.* (quoting Memorandum from Thomas W. Fredericks, *supra* note 67).

authority read as follows: “[T]he settlement should be accomplished rapidly . . . without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges.”<sup>199</sup>

In 1999, the DOI proposed a revision to its regulations regarding land acquisition.<sup>200</sup> The proposed regulations kept the regulatory prohibition on trust acquisitions in Alaska that had been in effect since 1980, while inviting comment on the Associate Solicitor’s 1978 Opinion.<sup>201</sup> The DOI issued finalized land acquisition regulations on January 16, 2001.<sup>202</sup> At the same time, the Solicitor issued an opinion advising the Assistant Secretary of Indian Affairs that, following the enactment of the Alaska Native Claims Settlement Act, Congress’ repeal in the Federal Land Policy and Management Act of section 2 of the original IRA “raise[d] a serious question as to whether the authority to take land into trust in Alaska still exists.”<sup>203</sup> The Solicitor also advised the assistant secretary that the preamble to the finalized regulations would bar trust acquisitions in Alaska, rather than Metlakatla, for three years.<sup>204</sup> During those three years, the DOI was supposed to “consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition.”<sup>205</sup> Further, the Solicitor rescinded the Associate Solicitor’s 1978 Opinion, which originally called into question the Secretary’s land-into-trust authority under the Alaska Native Claims Settlement Act.<sup>206</sup>

Yet on November 9, 2001, the DOI withdrew these finalized regulations, which had been issued just ten months earlier, on January 16th of that year.<sup>207</sup> This withdrawal left the original regulations, including Alaska’s exclusion from land-into-trust authority, in effect.<sup>208</sup> However, the DOI did not reinstate the Associate Solicitor’s 1978 Opinion.<sup>209</sup> As a result, Alaska’s

---

199. *Id.* (quoting 43 U.S.C. § 1601(b)).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* (quoting Memorandum from John D. Leshy, Solicitor, to Ass’t Sec’y, Indian Affs., Rescinding the September 15, 1978, Opinion of the Associate Solicitor for Indian Affairs Entitled “Trust Land for the Natives of Venetie and Arctic Village” (Jan. 16, 2001) [hereinafter Leshy Opinion]).

204. *Id.*

205. *Id.* (quoting Leshy Opinion, *supra* note 203, at 2).

206. *Id.* at 3.

207. *Id.* at 2–3.

208. *Id.* at 3.

209. *Id.*



exclusion from the Secretary's land-into-trust authority remained in place without any "clear legal basis or policy rationale."<sup>210</sup>

The Opinion recounts the course of events following *Akiachak Native Community v. Jewell*, where the District Court for the District of Columbia vacated the Alaska exception from the land-into-trust regulations.<sup>211</sup> As a result of this decision, the Principal Deputy Solicitor noted that the DOI decided to remove the Alaska exclusion from the Secretary's land-into-trust authority through the administrative process.<sup>212</sup> Subsequently, the State of Alaska's appeal was rendered moot and the district court's decision was vacated.<sup>213</sup>

The Principal Deputy Solicitor found the historical events outlined above exposed the limitations of the authority opinion. He claimed that, besides a passing reference to the Federal Land Policy and Management Act, there is no other mention in the authority opinion of the "nature, extent, or impact of such post-[Alaska Native Claims Settlement Act] legislation."<sup>214</sup> He further stated that the decision in *Akiachak Native Community v. Jewell* depended on the "privileges and immunities" amendments to the original IRA in removing the Alaska exception to the Secretary's land-into-trust authority.<sup>215</sup> Because the DOI finalized the land acquisition regulations before the district court's decision in *Akiachak Native Community v. Jewell* was vacated, the Principal Deputy Solicitor asserted it was unclear from the authority opinion "the extent to which the Department relied on the District Court's interpretation of the applicability of 25 U.S.C. § 476(g) [the privileges and immunities of Indian tribes statute,] after that Court's decision had been vacated."<sup>216</sup>

According to the Principal Deputy Solicitor, the authority opinion's limited discussion of post-Alaska Native Claims Settlement Act legislation is "a significant omission."<sup>217</sup> He argued that the Alaska Native Claims Settlement Act and the legislation that followed established a very different regime regarding Alaska Natives as compared to the tribes in the lower forty-eight states.<sup>218</sup> For instance, the 1980 Alaska National Interest Lands

---

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* (citing Act of May 31, 1994, Pub. L. No. 103-263, § 5(b)).

216. *Id.*

217. *Id.* at 4.

218. *Id.*

Conservation Act created a subsistence priority for rural residents, as well as a land bank program for undeveloped land open to Alaska Native Claims Settlement Act corporations.<sup>219</sup> The Federal Land Policy and Management Act revoked the Secretary of the Interior's authority to establish reservations in Alaska.<sup>220</sup> It also ended the Secretary's capability to patent lots in Alaska Native townsites.<sup>221</sup> In addition, the Alaska Native Claims Settlement Act's 1988 Amendments adjusted the lives of Alaska Natives by establishing settlement trusts, prohibiting the alienation of Alaska Native Claims Settlement Act corporate stock, and allowing Alaska Native Corporations to issue stock to Alaska Natives born after December 18, 1971, in accordance with the corporations' governing documents.<sup>222</sup>

Overall, the Principal Deputy Solicitor determined that the authority opinion disregarded Alaska's changed landscape following the Alaska Native Claims Settlement Act and failed to address the extent of its reliance on the now-vacated *Akiachak Native Community v. Jewell* decision.<sup>223</sup> Because the Principal Deputy Solicitor doubted "the completeness and balance" of the authority opinion, it was withdrawn in order to conduct the regulatory review process as mandated by the President's Chief of Staff.<sup>224</sup>

#### *IX. The Current Status of Solicitor Opinions M-37043 and M-37053*

Currently, the status of the Secretary of the Interior's land-into-trust authority is pending review.<sup>225</sup> As previously noted, the DOI has been holding consultations with Alaska Native Corporations and Alaska federally recognized tribes in order to resolve the uncertainty left by the withdrawal opinion.<sup>226</sup>

The DOI held a listening session in Fairbanks, Alaska on July 26, 2018.<sup>227</sup> Since that listening session, a public meeting and six consultations

---

219. *Id.*; see also Alaska National Interest Lands Conservation Act, tit. VII, § 811, 16 U.S.C. § 3121; *id.* tit. IX, § 907, 43 U.S.C. § 1636.

220. Op. Sol. Interior No. M-37053, at 4; see also Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785.

221. Op. Sol. Interior No. M-37053, at 4.

222. *Id.*; see also Alaska Native Claims Settlement Act Amendments of 1987, §§ 4, 5, 12(a), 43 U.S.C. § 1606(g)(1).

223. Op. Sol. Interior No. M-37053, at 4.

224. *Id.*

225. *Id.* at 2.

226. *Alaska IRA*, *supra* note 6.

227. *Id.*

have been conducted throughout Alaska on the land-into-trust issue.<sup>228</sup> The final consultation occurred on March 7, 2019, and the deadline to comment on the issue closed on March 15, 2019.<sup>229</sup>

*X. Reactions to Solicitor Opinion M-37053*

Since the withdrawal opinion withdrew the authority opinion, the Secretary of the Interior cannot currently take land into trust for Alaska Natives while the DOI is reviewing the issue. This current state of events was met with disappointment by many Alaska Natives, especially by Native rights leaders.<sup>230</sup> After the issuance of the withdrawal opinion, Carole Goldberg, a retired law professor at the University of California at Los Angeles and a member of the Indian Law & Order Commission, commented that the new solicitor opinion “was a retreat from rules that would have increased safety and justice in Alaska villages by increasing the power of tribal police and courts.”<sup>231</sup> Regardless, some Native rights leaders remain hopeful that the DOI will come to the conclusion that the Secretary can take land into trust for Alaska Natives.<sup>232</sup>

Nevertheless, waiting for the federal government to reach a conclusion on the land-into-trust issue is no easy task for the Alaska Natives. Not long after the withdrawal opinion’s issuance, Matt Newman, an attorney with the Native American Rights Fund in Anchorage, stated that the Akiachak tribal leaders<sup>233</sup> would be watching the federal government “very carefully” during its review of the issue.<sup>234</sup> Further, Newman went on to say, “[i]t’s hard for the tribes to sit here and watch the current administration say we’re trying to roll back Obama radicalism or federal overreach,” especially when, as Newman put it, “the federal government under Obama opposed the tribes.”<sup>235</sup>

Unfortunately, before the withdrawal opinion revoked the authority opinion, only one Alaska Native community was able to put land into

---

228. *Id.*

229. *Id.*

230. Mauer, *supra* note 74.

231. *Id.*

232. *Id.*

233. As in the Akiachak tribal leaders who challenged the land-into-trust issue in the three notable cases mentioned previously: *Akiachak Native Community v. Salazar*, *Akiachak Native Community v. Jewell*, and *Akiachak Native Community v. United States Department of Interior*.

234. Mauer, *supra* note 74.

235. *Id.*

trust.<sup>236</sup> This successful community was the tribal organization in Craig, Alaska, which put one acre into trust.<sup>237</sup> This one acre of trust land was used by a daycare center and a tribal office.<sup>238</sup> The Ninilchik Natives applied to put land into trust, but they did not succeed before the withdrawal opinion revoked the Secretary's land-into-trust authority.<sup>239</sup> The land the Ninilchik Natives hoped to take into trust was located under a bus barn.<sup>240</sup> If the Ninilchik Natives had been successful, they could have repurposed the land currently used as a bus barn in a way that would benefit the Tribe. For example, they could have erected a tribal government building or a community center, similar to what was done in Craig.

So, while Alaska's land-into-trust issue has caused much controversy, the only land requested to be taken into trust so far has been for modest uses. None of these uses—a daycare center, a tribal office, a bus barn—threaten big changes within the State of Alaska or any of the non-Native communities located nearby. To highlight this point, Newman commented that “[f]or all the huff and puff about how this would change Alaska, it’s actually the least eyebrow raising you could imagine: a daycare center and a tribal office.”<sup>241</sup>

It seems quite possible that all this fear associated with allowing the Secretary of the Interior to take land into trust for Alaska Natives may be unwarranted. This realization is especially apparent when comparing Alaska's situation to that of the forty-eight contiguous states. In any of the lower forty-eight states, it is rather unlikely that a proper land-into-trust application for land located under a bus barn would be denied. As the law currently stands, Alaska Natives are not treated with the same respect as Native American tribes located within the contiguous United States. To have such an unfair result created by Alaska's land-into-trust issue is unacceptable, especially when the statutory language, the legislative history, and the Indian canons of construction all point toward reinstating the Secretary's land-into-trust authority in Alaska.

---

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

*XI. An Analysis of the Secretary of the Interior's  
Land-into-Trust Authority in Alaska*

It is quite clear that the Secretary of the Interior does have the authority to place land into trust for Alaska Natives. The analysis provided in the authority opinion is incredibly detailed and digs into not only the plain language of the Alaska IRA and sections 5 and 19 of the original IRA, but the legislative history of both acts and Congress's primary purposes for enacting both pieces of legislation as well.<sup>242</sup> Such an in-depth look at the Secretary's land-into-trust authority as provided by this opinion does not comport with the withdrawal opinion's description of that document as an incomplete analysis that omits discussion of important statutory developments.<sup>243</sup>

Under the Alaska IRA, the Secretary of the Interior's land-into-trust authority outlined in section 5 of the original IRA was expressly extended to Alaska.<sup>244</sup> In fact, the Alaska IRA stated that section 5 of the original IRA "shall hereafter apply to the Territory [State] of Alaska."<sup>245</sup> And, as noted in the authority opinion, this section of the Alaska IRA is still in effect.<sup>246</sup> Therefore, with this section of the Alaska IRA still in place, there seems to be no reason to reevaluate the Secretary's land-into-trust authority in Alaska.

Further, the Indian canons of construction support the assertion that the Secretary of the Interior can take land into trust for Alaska Natives. Specifically, the first and third Indian canons of construction support this conclusion; the first canon states that ambiguous expressions must be resolved in favor of the Indian parties concerned, and the third explains that Indian treaties must be liberally construed in favor of the Indians.<sup>247</sup> According to these canons, the section of the Alaska IRA that extended section 5 of the original IRA must be construed in favor of the Alaska Natives. If there are any ambiguities in the language of the Alaska IRA, these ambiguities must be resolved in favor of the Alaska Natives.

---

242. *See generally* Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

243. Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review, Op. Sol. Interior No. M-37053, at 2 (June 29, 2018), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf>.

244. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043, at 10–11 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

245. *Id.* (quoting 25 U.S.C. § 5119).

246. *Id.* at 11.

247. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247–48 (1985).

Consequently, the Alaska IRA should be read in a way that favors the Alaska Natives. Under such a reading, the Secretary's land-into-trust authority clearly extends to Alaska.

Section 19 of the original IRA confirms that "Eskimos and other aboriginal peoples of Alaska shall be considered Indians."<sup>248</sup> Therefore, once Congress extended section 5 of the original IRA to Alaska via the Alaska IRA, Alaska Natives were considered "Indians" under the Act. As such, Alaska Natives do not have to meet any other definition of "Indian" under section 19.<sup>249</sup> Rather, it is simply clear that Alaska Natives are Indians under the original IRA. As such, Alaska Natives should be treated the same under section 5 of the original IRA as Indians located in the lower forty-eight states.

The Principal Deputy Solicitor argues in the withdrawal opinion that land-into-trust authority in Alaska could not have survived the Alaska Native Claims Settlement Act and the legislation that followed.<sup>250</sup> However, the authority opinion asserts that there is no reason the Alaska Native Claims Settlement Act and the Secretary's land-into-trust authority cannot co-exist in Alaska.<sup>251</sup> The reasoning in the authority opinion is far more compelling than that offered in the withdrawal opinion. First, the Alaska Native Claims Settlement Act left the Secretary's land-into-trust authority alone.<sup>252</sup> Second, the Alaska Native Claims Settlement Act did not terminate all trust land in Alaska nor prevent new restricted fee patents from being issued in Alaska.<sup>253</sup> Next, the Alaska Native Claims Settlement Act did not prohibit the creation of any new reservations in Alaska after the passage of the Act.<sup>254</sup> Finally, the Secretary's land-into-trust authority compliments the Alaska Native Claims Settlement Act's goal of tribal self-governance.<sup>255</sup> In contrast, in the withdrawal opinion, although the Principal Deputy Solicitor mentions that the Alaska Native Claims Settlement Act

---

248. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043, at 13 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf> (quoting 25 U.S.C. § 5129).

249. *Id.* at 13–14.

250. Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review, Op. Sol. Interior No. M-37053, at 4 (June 29, 2018), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf>.

251. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043, at 21 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 22.

established a different regime in Alaska,<sup>256</sup> he does not expand on this regime change or how such a change may revoke the Secretary's land-into-trust authority in Alaska.

The withdrawal opinion also calls out the Federal Land Policy and Management Act as post-Alaska Native Claims Settlement Act legislation that altered the Secretary's land-into-trust authority in Alaska.<sup>257</sup> The Principal Deputy Solicitor stated that the Federal Land Policy and Management Act repealed the Secretary's ability to establish reservations in Alaska and patent lots in Alaska Native townships.<sup>258</sup> However, he does not mention where in this act the Secretary's section 5 land-into-trust authority was revoked.<sup>259</sup> While the Federal Land Policy and Management Act revoked section 2 of the Alaska IRA, it did not revoke section 5.<sup>260</sup> The authority opinion argued that if Congress meant to revoke the Secretary's land-into-trust authority in Alaska, the Federal Land Policy and Management Act would have expressly revoked section 5 of the Alaska IRA in addition to section 2.<sup>261</sup> The authority opinion's argument is more compelling than the withdrawal opinion's mere recitation of fact. The authority opinion does not deny that the Federal Land Policy and Management Act revoked Section 2 of the Alaska IRA, it simply makes clear that section 5 was not also revoked.<sup>262</sup> Meanwhile, the withdrawal opinion does not explain how the Federal Land Policy and Management Act repealed the Secretary's land-into-trust authority in Alaska.<sup>263</sup>

Overall, the withdrawal opinion suffers from a lack of analysis and explanation. The Principal Deputy Solicitor claims that the authority opinion is incomplete and unbalanced;<sup>264</sup> however, this description fits the withdrawal opinion far better than the authority opinion. The withdrawal opinion does not explore with sufficient depth how the statutory

---

256. Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review, Op. Sol. Interior No. M-37053, at 4 (June 29, 2018), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf>.

257. *Id.*

258. *Id.*

259. *Id.*

260. Authority to Acquire Land into Trust in Alaska, Op. Sol. Interior No. M-37043, at 8 (Jan. 13, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37043.pdf>.

261. *Id.* at 22.

262. *Id.*

263. See Withdrawal of Solicitor Opinion M-37043, "Authority to Acquire Land into Trust in Alaska" Pending Review, Op. Sol. Interior No. M-37053, at 4 (June 29, 2018), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37053.pdf>.

264. *Id.*

developments since the Alaska Native Claims Settlement Act rendered the conclusions reached in the authority opinion no longer applicable.<sup>265</sup> Although the withdrawal opinion cites various statutory developments that have occurred since the Alaska Native Settlement Act was passed, it does not explain how these developments negate the Secretary's land-into-trust authority in Alaska.<sup>266</sup> Rather, it seems as though the withdrawal opinion is a bare-bones attempt to revoke a former Solicitor's opinion simply because the previous administration and the current administration have different goals and ideals.

Alaska Natives should not be forced to suffer because the current administration wishes to undo decisions reached by the Obama Administration before it left office. The analysis in the authority opinion is not incomplete as the Principal Deputy Solicitor claimed in the withdrawal opinion.<sup>267</sup> Therefore, the DOI should issue a new opinion confirming that the Secretary can take land into trust for Alaska Natives.

### *XII. The Future of Alaska's Land-into-Trust Issue*

Although the Alaska exception and Alaska's land-into-trust issue is currently pending review by the DOI, a final resolution by the department will become irrelevant if Congress solves this issue in the meantime. Thankfully for Alaska Natives, a congressional resolution on this issue is already in progress. In May of 2019, the United States House of Representatives passed House Bill 375, which gives the United States Secretary of the Interior authority to take land into trust for any federally recognized tribe.<sup>268</sup> To ensure clarity and to avoid the same issues that resulted in the past exclusion of Alaska Natives, this bill specifically includes Alaska Native Tribes.<sup>269</sup>

The bill passed the House of Representatives with a vote of 323-96, demonstrating just how great congressional support is for a resolution to the Alaska land-into-trust issue.<sup>270</sup> When commenting on the bill, Oklahoma Republican Representative Tom Cole stated, "Where that happens in Alaska, I think they should have exactly the same protections that we're

---

265. *Id.*

266. *Id.*

267. *Id.* at 2.

268. Liz Ruskin, *US House Bill Would Clear Path for Alaska Tribes to Put Land in Trust*, KTOO (May 16, 2019), <https://www.ktoo.org/2019/05/16/us-house-bill-clears-path-for-alaska-tribes-to-put-land-in-trust/>; H.R. 375, 116th Cong. (2019-2020).

269. Ruskin, *supra* note 268.

270. *Id.*



proposing for all tribes.”<sup>271</sup> House Bill 375 was received by the United States Senate in May of 2019.<sup>272</sup> The Senate read the bill twice and referred it to the Committee on Indian Affairs.<sup>273</sup> If House Bill 375 passes the Senate, Alaska Natives may see this land-into-trust issue solved by congressional action rather than through the DOI’s issuance of a final opinion. House Bill 375 passing the Senate and eventually becoming law would be the best-case scenario for Alaska Natives. If House Bill 375 became law, it would solidify the Secretary’s authority to take land into trust for Alaska Natives, making any further solicitor opinions on the subject unnecessary.

### *XIII. What Could Change in Alaska if House Bill 375 Is Passed?*

If House Bill 375 does become law, it will change the lives of many Alaska Natives. As noted earlier, trust land can and will bring many benefits to Alaska Native tribes—especially those located in remote communities.<sup>274</sup> However, life in Alaska for Alaska Natives and non-Alaska Natives alike will look rather different going forward if House Bill 375 does become law and the Secretary of the Interior can officially take land into trust for Alaska Natives. While Alaska Natives and tribal communities would see many benefits, there may also be some unfortunate ramifications for the State of Alaska and non-Alaska Natives living within the state. These implications likely sparked the State of Alaska’s need to fight the revocation of the Alaska exception in the three federal court cases discussed above.

For example, House Bill 375’s passage could make the management of fish and game resources much more complex.<sup>275</sup> If the Secretary of the Interior takes land into trust for Alaska Natives, then these Alaska Natives would be able to implement their own fishing and hunting regulations on the acquired trust land. Since fish and game resources play a big role in the Alaskan way of life as well as Alaskan tourism,<sup>276</sup> this change could have far greater consequences than many non-Alaskans may anticipate. For example, many non-Native trade associations and recreational sports

---

271. *Id.*

272. *All Information (Except Text) for H.R. 375*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/375/all-info> (last visited Dec. 1, 2020).

273. *Id.*

274. *See supra* text accompanying notes 76–86.

275. Downing, *supra* note 120.

276. *See generally* Alaska Dep’t of Fish & Game, <http://www.adfg.alaska.gov/index.cfm?adfg=home.main> (last visited Dec. 1, 2020).

organizations in Alaska oppose the extension of the Secretary's land-into-trust authority to Alaska.<sup>277</sup> Their opposition is rooted in the fear that the potential hunting and fishing regulations imposed by Alaska Natives would destroy "the carefully crafted conservation regime and 'inflamm tensions between groups.'"<sup>278</sup> While this fear is merely speculative, it attracts attention. Many individuals resist change; changes in hunting and fishing regulations in Alaska could affect not only local trade associations and recreational sports organizations, but also hunters and anglers throughout the world.

Currently, many hunting areas in Alaska are privately owned; most of this privately owned hunting land is held by Alaska Natives.<sup>279</sup> The Alaska Department of Fish and Game recommends hunters gain specific information from the private landowners regarding hunting on the land of Alaska Natives.<sup>280</sup> On its website, the Department also notes that some private landowners may charge a fee for hunting on their land.<sup>281</sup> Since hunting on private lands without permission constitutes trespassing, the private land owner must first be contacted for permission.<sup>282</sup> If Alaska Natives were allowed to obtain land through the Secretary's land-into-trust authority, they would then become the new owners of any of the land they obtained. Therefore, hunters would need to seek permission from the Alaska Natives before entering the land. The Alaska Natives could also charge a fee to those that wish to hunt on their lands. While there is no way to know exactly what hunting and fishing regulations the Alaska Natives would implement on their trust land, the possibility of more fees and regulations will likely cause a stir in the hunting and fishing community in Alaska.

If House Bill 375 is passed, Alaska Natives and business entities run by Alaska Natives on trust land would become exempt from state laws on marijuana, gaming, alcohol, tobacco, and fireworks.<sup>283</sup> While this may open up various economic and business opportunities for Alaska Natives, it could

---

277. Strommer, *supra* note 76, at 519.

278. *Id.*

279. *Land Status, Access and Federal Hunting Regulations*, ALASKA DEP'T OF FISH & GAME, <https://www.adfg.alaska.gov/index.cfm?adfg=hunting.access> (last visited Jan. 5, 2020).

280. *Id.*

281. *Id.*

282. See Ellen Simpson, *No Hunting or Fishing Without Access: Public Access in Alaska*, ALASKA FISH & WILDLIFE NEWS (May 2009), [http://www.adfg.alaska.gov/index.cfm?adfg=wildlifefews.view\\_article&articles\\_id=429](http://www.adfg.alaska.gov/index.cfm?adfg=wildlifefews.view_article&articles_id=429).

283. Downing, *supra* note 120.

lead to tension with the non-Native communities nearby, especially if these communities do not support the sale of such products or activities. In 2015, Alaska became the third state to legalize the recreational use of marijuana.<sup>284</sup> However, Alaska Measure 2, which legalized marijuana, only garnered support from 53.23% of voters.<sup>285</sup> Consequently, almost half of the state's voting population opposes legalizing marijuana. While trust land would be exempt from the already lenient state marijuana laws, Alaska Natives looking to benefit economically from this exception may find opposition from local communities if those communities represent that part of the population that is not supportive of legalizing the recreational use of marijuana. So even while the State of Alaska is more open to the recreational use of marijuana, there is a possibility that Native and non-Native communities will clash over its regulation on trust land.

Lastly, non-Native Alaskans could lose access to historic trails if the trails' ownership shifts from the federal government to an Alaska Native tribe when House Bill 375 is passed.<sup>286</sup> Such a loss could potentially affect the quality of life of many Alaskans; because many Alaskans rely on the outdoors for various forms of recreation, losing access to historic trails would affect their hiking, dogsledding, hunting, fishing, and biking routines and experiences. As entering private land without permission is trespassing, those wishing to use historic trails on Alaska Native trust land would need to ask the Alaska Natives for permission. Therefore, although the passage of House Bill 375 could solve many problems for Alaska Natives, it will also bring new issues and a potential need to compromise with the non-Native local communities nearby potential trust land.

#### *XIV. Conclusion*

The Secretary of the Interior should have the authority to take land into trust for Alaska Natives. The Secretary can acquire this authority from congressional action if House Bill 375 is passed or from the issuance of a new Solicitor's Opinion; however this authority is achieved, Alaska Natives

---

284. *Alaska Becomes 3rd State with Legal Marijuana*, USA TODAY (Feb. 24, 2015, 11:18 AM), <https://www.usatoday.com/story/news/nation/2015/02/24/alaska-legal-marijuana/23922313/>.

285. Alaska Div. of Elections, 2014 General Election, Nov. 4, 2014: Official Results 6 (Nov. 25, 2014), <https://www.elections.alaska.gov/results/14GENR/data/results.pdf>; see also *Alaska Marijuana Legalization, Ballot Measure 2 (2014)*, BALLOTPEDIA, [https://ballotpedia.org/Alaska\\_Marijuana\\_Legalization,\\_Ballot\\_Measure\\_2\\_\(2014\)](https://ballotpedia.org/Alaska_Marijuana_Legalization,_Ballot_Measure_2_(2014)) (last visited Aug. 29, 2020).

286. Downing, *supra* note 120.

should be allowed the same land-into-trust benefits that Native Americans receive in the lower forty-eight states.

The withdrawal opinion is nothing more than a bare-bones attempt to reverse the policy of a previous administration. As such, the withdrawal opinion should be discarded and the DOI should issue a new opinion reinstating the conclusion drawn in the authority opinion. The land-into-trust issue has been pending in Alaska long enough, and the DOI should resolve it in favor of the Alaska Natives.